

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:

Case No. 20-23457-A-7

ERNESTO PATACSL and MARILYN EMBRY
PATACSL

Debtor.

JOSEPH CABARDO et al.

Adv. No. 20-02167-A

Plaintiffs,

FEC-1

V.

ERNESTO PATACSIL et al.,

Defendants.

MEMORANDUM

(Motion in Limine to Exclude Non-Percipient Witnesses)

1 Motion must state with particularity the relief sought. Fed. R.
2 Civ. P. 7007(b) (1) (C). Defendants have lodged the direct written
3 testimony of eight witnesses. By motion in limine, plaintiffs seek to
4 exclude the testimony of witnesses that lack personal knowledge, Fed.
5 R. Evid. 602. But they have not specified which of the declarations
6 and/or other evidence to which they object. Should the court grant
7 the motion?

8 **I. FACTS**

9 Prior to the matters that are now before this court eight former
10 employees, acting under the Private Attorney General Act of 2004,
11 brought an action against the defendants in District Court for wage
12 and hours violations arising from their employment. The plaintiff
13 employees prevailed at trial and the District Court awarded them
14 damages of \$893,815 and attorneys' fees of \$1,077,218.

15 Defendants then filed a Chapter 7 bankruptcy.

16 Plaintiff employees and their attorneys in the underlying action
17 filed this adversary proceeding to except the judgment from discharge.
18 11 U.S.C. § 523(a)(6), (a)(7).

19 **II. PROCEDURE**

20 Plaintiffs have filed a motion in limine to exclude "all
21 evidence, reference to evidence, testimony or argument related to
22 testimony or declarations of non-percipient witnesses." Mot. in
23 Limine to Exclude Non-Percipient Witnesses 2:2-4, ECF No. 104.
24 Defendants oppose the motion. Opp'n, ECF No. 141. Oral argument will
25 not be helpful. LBR 9014-1(h); *Morrow v. Topping*, 437 F.2d 1155, 1156
26 (9th Cir. 1971).

27 **III. JURISDICTION**

28 This court has jurisdiction. 28 U.S.C. §§ 1334(a)-(b), 157(b);

1 see also General Order No. 182 of the Eastern District of California.
2 Jurisdiction is core. 28 U.S.C. § 157(b)(2)(I); *Carpenters Pension*
3 *Trust Fund for Northern Calif. v. Moxley*, 734 F.3d 864, 868 (9th
4 2013); *In re Kennedy*, 108 F.3d 1015, 1017 (9th Cir. 1997). Plaintiffs
5 do not consent to the entry of final orders and judgments by this
6 court; defendants do so consent. 28 U.S.C. § 157(b)(3); *Wellness*
7 *Int'l Network, Ltd. v. Sharif*, 135 S.Ct. 1932, 1945-46 (2015).
8 Scheduling Order § 2.0, ECF No. 13.

9 **IV. LAW**

10 Motions in limine should be granted cautiously.

11 A motion in limine is a request for the court's guidance
12 concerning an evidentiary question. Judges have broad
13 discretion when ruling on motions in limine. However, a
14 motion in limine should not be used to resolve factual
15 disputes or weigh evidence. *To exclude evidence on a motion*
in limine the evidence must be inadmissible on all
potential grounds. Unless evidence meets this high
16 standard, evidentiary rulings should be deferred until
trial so that questions of foundation, relevancy and
potential prejudice may be resolved in proper context.

17 *Hays v. Clark County Nev.*, 2008 WL 2372295 *7 (NV 2008) (internal
18 citations and quotation marks omitted) (emphasis added).

19 **V. DISCUSSION**

20 An action to except a debt from discharge has three elements: (1)
21 a debt, *In re Dobos*, 303 B.R. 31, 39 (9th Cir. BAP 2019); *Northbay*
22 *Wellness Group, Inc. v. Beyries*, 789 F.3d 956, 959 n. 3 (9th Cir.
23 2015) (existence of a debt determined by state law); (2) at least one
24 of the enumerated exceptions of § 523(a), i.e., 11 U.S.C. §
25 523(a)(6), (a)(7); and (3) an amount of damages. *Dobos*, 303 B.R. at
26 39. Affirmative defenses exist. *E.g.*, Fed. R. Bankr. P. 4007 (time
27 limitations).

28 Motions must state with particularity the grounds on which the

1 motion is made, and the relief sought.

2 (b) (1) In General. A request for a court order must be made
3 by motion. The motion must:

4 (A) be in writing unless made during a hearing or trial;

5 (B) *state with particularity the grounds for seeking the*
order; and

6 (C) *state the relief sought.*

7 Fed. R. Civ. P. 7, incorporated by Fed. R. Civ. P. 7007 (emphasis
8 added); see also, Fed. R. Bankr. P. 9013; LBR 9014-1(d) (3) (A).

9 "The particularity requirement gives notice to the court and the
10 opposing party, providing the opposing party "a meaningful opportunity
11 to respond and the court with enough information to process the motion
12 correctly." *Hinz v. Neuroscience, Inc.*, 538 F.3d 979, 983 (8th Cir.
13 2008), quoting *Andreas v. Volkswagen of Am., Inc.*, 336 F.3d 789, 793
14 (8th Cir. 2003).

15 Prior to trial the court ordered the parties to submit direct
16 testimony by written submission and to lodge documentary evidence to
17 be offered at trial. Am. Pretrial Order §§ 1.0, 4.0, 5.0, ECF No. 95.
18 Defendants did so, offering eight declarations and ten exhibits.
19 Notwithstanding receipt of this evidence the motion in limine does not
20 "state with particularity" the exhibits or the testimony to which the
21 plaintiffs object. The best articulation of the objectionable
22 evidence is the "testimony of non-percipient witnesses." Mot. to
23 Exclude 3:14-17, ECF No. 104. Defendants complain that they cannot
24 ascertain to which declarations and/or exhibits the plaintiffs object.
25 Opp'n 1:25-26 (plaintiffs "never specifically...[ask] what exactly
26 they are asking the Court to exclude"), 2:4-5, 2:12-14. Nor can the
27 court. Except for experts, only witnesses with personal knowledge may
28 offer testimony. Fed. R. Evid. 602. The problem is: it is unclear

1 which of the defendants' witnesses the plaintiff's contend lack
2 personal knowledge of facts pertaining to the existence of a debt, the
3 applicability of § 523(a)(6) (willful and malicious) or § 523(a)(7)
4 (fine payable for the benefit of a governmental unit), and/or the
5 amount of damages. Without such an articulation, neither the
6 defendants, nor this court, have a principled way to rule on such an
7 objection.

8 **VI. CONCLUSION**

9 For each of these reasons, the motion in limine to exclude
10 testimony and other evidence of non-percipient witnesses is denied.
11 An order will issue from chambers.

12 **Dated:** February 13, 2023

13 
14 **Fredrick E. Clement**
15 **United States Bankruptcy Judge**

16
17
18
19
20
21
22
23
24
25
26
27
28

Instructions to Clerk of Court

Service List - Not Part of Order/Judgment

The Clerk of Court is instructed to send the Order/Judgment or other court generated document transmitted herewith *to the parties below*. The Clerk of Court will send the document via the BNC or, if checked , via the U.S. mail.

| Attorneys for the Plaintiff(s) | Attorneys for the Defendant(s) |
|--|--|
| Bankruptcy Trustee (if appointed in the case) | Office of the U.S. Trustee Robert T. Matsui United States Courthouse 501 I Street, Room 7-500 Sacramento, CA 95814 |